LIBRARY
SUPREME COURT, U. S.

FILED
DEC 24 1975
MICHAEL RODAK JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-9071

DWIGHT K. BRAMBLETT,
Petitioner,

v.

DONNA S. LEE,
by RALPH K. LEE,
her next friend
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Robert C. Levinson
One Indiana Square, Suite 3300
Indianapolis, Indiana 46204
Counsel for Petitioner

Central Publishing Company, Inc., Indianapolis, Ind. 46206

INDEX

Page

Table Authorities ii

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provisions and Statutes Involved 2

Statement of the Case 7

1. The Facts Material to Consideration of the Questions Presented 7
2. Raising of the Federal Questions 8

Argument 9

Conclusion 13

I

WHETHER PETITIONER WAS DENIED DUE PROCESS AND FAIR TRIAL WHERE THE TRIAL COURT REFUSED TO GRANT RELIEF FROM A STIPULATION OF PATERNITY MADE BY PETITIONER'S ATTORNEY WITHOUT THE AUTHOITY OR UNDERSTANDING OF PETITIONER.

TABLE OF AUTHORITIES

Cases

	Page
Berry v. Chaplin (1946) Cal. App., 169 p. 2d 442	11
Bramblett v. Lee (1974) — Ind. App., — 320 N.E. 2d 778, pet. for transf. denied	1
Carnegie Steel Co. v. Cambria Iron Co. (1902) 185 U.S. 403, 22 S. Ct. 698	10
Central Distribution Inc. v. M.E.T. Inc. (5th Cir., 1968) 403 F. 2d 943	11
Devenbaugh v. Nifer (1892) 3 Ind. App., 379 29 N.E. 923	9
Hillman v. State (1954) 234 Ind. 47, 123 N.E. 2d 180 ..	12
Nahas v. State (1927) 119 Ind. 117, 155 N.E. 259	12
Russell-Miller Milling Co. v. Todd (5th Cir., 1952) 198 F. 2d 166	11
Sibron v. New York (1968) 392 U.S. 40, 88 S. Ct. 1889	10
State v. Richardson (1945) 223 Ind. 557, 63 N.E. 2d 195	12
Thompson v. Pershing (1882) 86 Ind. 303	9

Constitutional Provisions

United States Constitution, Fifth Amendment	2
United States Constitution, Sixth Amendment	3
United States Constitution, Fourteenth Amendment ..	3
Constitution of the State of Indiana, First Article, Section 12	3

TABLE OF AUTHORITIES—Continued

Page

Statutes

Indiana Code of 1971, I.C. 34-4-1-13 6

Indiana Code of 1971, I.C. 34-4-1-16 6

Indiana Code of 1971, I.C. 34-4-1-22 6

Court Rules

Indiana Rules of Civil Procedure, Trial Rule 59(A)(1) 11

Indiana Rules of Civil Procedure, Trial Rule 59(E) .. 10

Indiana Rules of Civil Procedure, Appellate Rule 15(M) 10

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No.———

DWIGHT K. BRAMBLETT,

Petitioner,

v.

DONNA S. LEE,
by RALPH K. LEE,
her next friend

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

OPINION BELOW

The opinion of the Court of Appeals of Indiana is reported in —— Ind. ——, 320 N.E.2d 778. It is printed in Appendix A to this petition, together with the order denying petition to transfer of the Supreme Court of Indiana dated September 29, 1975 without opinion.

JURISDICTION

1. The jurisdiction of this Court is invoked to review a final decision of the highest Court of the State in which

a decision could be had, on the ground that there was drawn in question a right privilege and immunity claimed by the petitioner under the Constitution of the United States, in that refusal of the trial court to grant relief from an unauthorized stipulation of paternity made by petitioner's counsel not knowingly consented to by petitioner denied him the right to trial and due process of law.

2. The date of the judgment sought to be reviewed as well as the time of its entry, was September 29, 1975, and the expiration of time for filing Petition for Writ of Certiorari in this Court was December 28, 1975.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S. Code, § 1257 (3).

QUESTIONS PRESENTED

1. WHETHER PETITIONER WAS DENIED DUE PROCESS AND FAIR TRIAL WHERE THE TRIAL COURT REFUSED TO GRANT RELIEF FROM A STIPULATION OF PATERNITY MADE BY PETITIONER'S ATTORNEY WITHOUT THE AUTHORITY OR UNDERSTANDING OF PETITIONER.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) The Fifth Amendment to the Constitution of the United States, reading as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

nor jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, property, without due process of law; nor shall private property be taken for public use, without just compensation."

(2) The Sixth Amendment to the Constitution of the United States, reading as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

(3) The Fourteenth Amendment to the Constitution of the United States, reading as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(4) The First Article, Section 12 of the Constitution of Indiana, reading as follows:

"All Courts shall be open; and every man, for injury done to him in his person, property or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely and without denial; speedily and without delay."

(5) Indiana Rules of Civil Procedure, Trial Rule 59 (A)(1), reading as follows:

(A) Motion to correct errors—When granted. The court upon its own motion or the motion of any of the parties for or against all or any of the parties and upon all or part of the issues shall enter an order for the correction of errors occurring prior to the filing thereof, including, without limitation, the following:

(1) Denial of a fair trial by any irregularity in the proceedings of the court, jury or prevailing party, or any order of court, abuse of discretion, misconduct of the jury or prevailing party;

(6) Indiana Rules of Civil Procedure Trial Rule 59 (E) reading as follows:

(E) Relief granted on motion to correct errors. The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the issues;

(1) Grant a new trial;

(2) Enter final judgment;

(3) Alter, amend, modify or correct judgment;

(4) Amend or correct the findings or judgment as provided in Rule 52(b);

(5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of proper damages, grant a new trial, or grant a new trial subject to additur or remittitur;

(6) Grant any other appropriate relief, or make relief subject to condition; or

(7) Indiana Rules of Civil Procedure Appellate Rule 15(M) reading as follows:

RULE 15

Opinions, Powers and Conduct of Court on Appeal; Miscellaneous Provisions

(M) Order or Relief Granted on Appeal. An order or judgment upon appeal may be reversed as to some or all of the parties and in whole or in part. The court, with respect to all or some of the parties or upon all or some of the issues, may order:

(1) A new trial;

(2) Entry of final judgment;

(3) Correction of a judgment subject to correction, alteration, amendment or modification;

(4) In the case of claims tried without a jury or with an advisory jury, order the findings or judgment amended or corrected as provided in Rule 52(b);

(5) In the case of excessive or inadequate damages, entry of final judgment on the evidence for the amount of the proper damages, a new trial, or a new trial subject to additur or remittitur; or

(6) Grant any other appropriate relief, and make relief subject to conditions.

The court shall direct final judgment to be entered or shall order the error corrected without a new trial unless such relief is shown to be impracticable or unfair to any of the parties or is otherwise improper; and if a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair. A judgment may be affirmed on conditions. A verdict, finding, judgment, order or decision shall be reversed upon appeal as not supported by or as contrary to the evidence only when clearly erroneous, and due regard shall be given to the opportunity of the finder of fact to judge the credibility of witnesses.

(8) Indiana Code of 1971, I.C. 34-4-1-13 reads as follows:

Issuance and service of warrant of arrest.—Upon the filing of such a petition the court may direct the clerk to issue a warrant in lieu of a summons for the defendant, if the defendant be the alleged father. Such warrant and the issuance and execution thereof shall be as provided for by law in criminal actions.

(9) Indiana Code of 1971, I.C. 34-4-1-16 reads as follows:

Trial—Right to jury—Competency of witnesses——Trial not public.—The hearing shall be by the court but if either party demands a jury, it shall be by jury. Both the mother and the alleged father shall be competent to testify but the alleged father shall not be compelled to give evidence. The court shall exclude the general public from the hearing, and admit only those persons directly interested in the case, including officers of the court.

(10) Indiana Code of 1971, I.C. 34-4-1-22 reads as follows:

Security for payment of judgment—Bond—Failure to furnish bond—Penalty—Probation.—The court may, in its discretion, require the father to give security by bond with sureties conditioned that he will pay the judgment and otherwise comply with the order of the court. On failure to furnish such bond the court may commit the father to jail for not more than one [1] year. The obligation to pay the judgment, and otherwise to comply with the order of the court shall not be affected by the commitment to, or a discharge from, jail. Instead of committing the father to jail, or as a condition of his release therefrom, the court may commit him to a probation officer, upon such terms and conditions regarding payments and personal reports as the court may direct. Upon failure to comply

with such terms and conditions the court may commit or recommit the father to jail.

STATEMENT OF THE CASE

(1) The Facts Material to Consideration of the Questions Presented

On the date of trial in this paternity action below, petitioner went to his attorney's office. Petitioner's attorney indicated to him that he had neglected to place the trial date on his calendar and was not prepared to try the case. Petitioner's attorney then notified the trial court by telephone of such circumstances and indicated that the court could find paternity by stipulation of the parties. The court entry of the stipulation reflects these unusual circumstances. Petitioner had indicated to his attorney only that he should handle the case as he saw fit. No written stipulation was ever filed with the court and no inquiry was ever made by the court at petitioner's subsequent appearance before it, prior to entry of judgment as to his understanding of the legal effect of such stipulation, until so advised by subsequent counsel more than 40 days later after an intervening hearing was held.

Petitioner sought relief from such stipulation of paternity entered by his attorney, by motion to correct errors to the trial court, which was denied.

Petitioner thereafter appealed the denial of such motion to the Indiana Court of Appeals which affirmed the judgment of the trial court on December 30, 1974. Petitioner sought rehearing and transfer in the Supreme Court of Indiana which was denied on September 29, 1975. It is from such order of denial of rehearing and transfer that petitioner now seeks grant of certiorari.

(2) Raising of the Federal Questions

It appears both from the order of the Indiana Supreme Court denying transfer from the Indiana Court of Appeals without opinion, and from the Opinion of the Indiana Court of Appeals which affirmed the judgment of the trial court that there exists a question as to whether the federal questions here presented were actually considered and decided. It is therefore relevant to determine how and when petitioner raised a federal question in the trial court and the court below.

Petitioner first raised the questions considered here in the trial court in both his motion to correct errors and his consolidated motion to reconsider motion to correct errors, wherein petitioner alleged that refusal of the trial court to grant relief from entry of an unauthorized stipulation of paternity by his counsel constituted an abuse of judicial discretion because of the trial court's failure to examine petitioner as to his understanding and consent to such stipulation at his later appearance before the trial court prior to entry of judgement.

Petitioner claimed that he was thereby denied the right of trial on the essential issue of paternity and due process as guaranteed by the 6th and 14th Amendments to the Constitution of the United States.

Petitioner further raised the Federal questions presented here in the issues and arguments in his brief filed in the Court of Appeals of Indiana and in his petition for transfer filed in the Indiana Supreme Court where he presented the sole issue of whether a trial court has the obligation of relieving a party of a stipulation when such relief is necessary to prevent manifest injustice and assure due process inherent in full litigation of all essential issues through the right of trial. Such question petitioner now presents to obtain grant of certiorari.

ARGUMENT

1. WHETHER PETITIONER WAS DENIED DUE PROCESS AND FAIR TRIAL WHERE THE TRIAL COURT REFUSED TO GRANT RELIEF FROM A STIPULATION OF PATERNITY MADE BY PETITIONER'S ATTORNEY WITHOUT THE AUTHORITY OR UNDERSTANDING OF PETITIONER.

In its written opinion the Court of Appeals of Indiana, (1974) — Ind. App. — 320 N.E.2d 778 has taken the position that petitioner is bound by the actions of his attorney and must look elsewhere for redress if the entry of the stipulation of paternity was contrary to directions. In its opinion that Court relied upon the decisions in *Thompson v. Pershing* (1882) 86 Ind. 303, and *Devenbaugh v. Nifer* (1892) 3 Ind. App. 379, 29 N.E. 923, for the proposition that a client is bound by the acts of his attorney. These two cases are easily distinguished from the case at bar in that they were cases which were based primarily upon pecuniary matters. *Thompson* was concerned with an action on a bond, and *Devenbaugh* concerned a debt for services rendered. If an unauthorized or negligent act was done by the aggrieved party's attorney, the aggrieved client could be made whole by a money damages award in an action against the attorney.

Section 12 of Article 1 of the *Constitution of Indiana* reads as follows:

> "All Courts shall be open; and every man, for injury done to him in his person, property or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely and without denial; speedily and without delay."

In the case at bar monetary damages against petitioner's initial attorney could not be adequate within the context of Section 12 of Article 1 of the *Constitution of Indiana* or the Fifth Amendment to the Constitution of the United States. In an action against petitioner's initial attorney, there is no authority for the trial court to shift the adjudication of paternity to petitioner's attorney. Petitioner's only adequate relief, within the context of the aforesaid constitutional provisions, is relief from the stipulation of paternity. It is respectfully submitted that the trial court below should have relieved Bramblett from the stipulations of paternity pursuant to TR 59(E) (6) of the Indiana Rules of Procedure. By virtue of AP 15(M) of the Indiana Rules of Procedure, giving the Court of Appeals of Indiana jurisdiction to dispose of cases whenever possible by granting appropriate relief, that court also had the authority to remand this case to the circuit court below with instructions to vacate the judgment and relieve Bramblett from the stipulation of paternity.

The question of when a court, to prevent manifest injustice, must relieve a party of stipulation inadvertently entered into is raised in this appeal, when such relief is necessary to assure due process inherent in full litigation of all essential issues through the right of trial.

In the pursuit of criminal justice the Supreme Court of the United States recognized that the administration of criminal law cannot be left to the stipulation of the parties. *Sibron vs. New York* (1968) 392 U.S. 40, 88 S.Ct. 1889. In that case the Court refused to accept a State's confession of error.

With respect to civil matters the Court's attention is directed to the Supreme Court of the United States decision in *Carnegie Steel Co. v. Cambria Iron Co.* (1902) 185 U.S.

403, 22 S.Ct. 698. In that case the attorney for one of the parties expected to be absent for four months, and he entered into certain stipulations "to save delay". The stipulation was later repudiated because of facts subsequently developed. The Court recognized that stipulations should not be used as a pitfall and a party should be able to repudiate a stipulation inadvertently entered into.

In *Russell-Miller Milling Co. v. Todd* (5th Cir., 1952) 198 F.2d 166 a stipulation under an honest mistake was made by an attorney. The Court allowed relief therefrom.

In *Central Distribution, Inc. v. M.E.T., Inc.* (5th Cir., 1968) 403 F.2d 943 the circuit court of appeals stated that a trial court has the obligation of relieving counsel of stipulations when such relief is necessary to prevent manifest injustice.

The manifest injustice involved here is the finding of paternity by stipulation through an attorney-client misunderstanding and the trial court's failure to take corrective action when the facts were presented to the Court.

To the extent that there are no reported Indiana cases concerning unauthorized paternity stipulations in particular, this is a case of first impression. It is respectfully submitted that when issues as grave as the one before the circuit court below are in question, the circuit court has an obligation to scrutinize stipulations to the extent that the ends of justice are not defeated. *Berry v. Chaplin* (1946) Cal. App., 169 P.2d 442. By virtue of Rule TR 59(A)(1), the call for such scrutiny may be invoked in the Motion to Correct Errors.

There are some criminal characteristics to a paternity action. For instance, the court may issue an arrest warrant in lieu of a summons. I.C. 1971, 31-4-1-13. When the case

goes to trial, the alleged father is not compelled to give evidence. I.C. 1971, 31-4-1-16. Moreover, the trial court may, after judgment, require the father to give a surety bond to secure payment of the judgment, and if he fails to give such bond, he may be imprisoned for not more than one year. Thus, as a practical matter, one adjudicated as a father, pursuant to a paternity action, may have his liberty in jeopardy as does one found guilty of committing a felony. I.C. 1971, 31-4-1-22.

When a person is charged with a felony and wants to plead guilty, he must do so personally and not by or through an attorney. *State v. Richardson* (1945) 223 Ind. 557, 63 N.E. 2d 195; *Nahas v. State* (1927) 119 Ind. 117, 155 N.E. 259. Moreover, incompetency of counsel may be grounds for reversal of a felony conviction. *Hillman v. State* (1954) 234 Ind. 47, 123 N.E.2d 180. Thus a person found guilty of the commission of a felony may, as a practical matter, be better off than one adjudicated a father if the criminal defendant receives probation or a suspended sentence.

In light of the rights to criminal defendants and in light of the quasi-criminal aspects of a paternity action, it would seem to be the trial court's obligation to at least scrutinize stipulations of paternity given over the telephone at the time of trial when the stipulating attorney states that he neglected to put the trial date on his calendar.

The minimum standards inherent in the concept of due process and right of trial in such criminal cases should likewise been applied in petitioner's situation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for the writ should be granted as the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted,

Robert C. Levinson
Attorney for Petitioner,
1 Indiana Square, Suite 3300
Indianapolis, Indiana 46204

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No.————

DWIGHT K. BRAMBLETT,

Petitioner,

v.

DONNA S. LEE,

by RALPH K. LEE,
her next friend

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 1975, three copies of the Petition for Writ of Certiorari, were mailed, postage prepaid to David E. Lawson, Esq., Attorney for Respondent, 138 West Marion, Danville, Indiana. I further certify that all parties required to be served have been served.

/s/ ROBERT C. LEVINSON

Robert C. Levinson
One Indiana Square, Suite 3300
Indianapolis, Indiana 46204
Counsel for Petitioner